STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL TOTTEN,

Defendant-Appellant.

UNPUBLISHED
October 16, 2003

No. 241752
St. Clair Circuit Court
LC No. 01-002047-FC

Before: Fitzgerald, P.J., and Zahra and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (by virtue of relationship), MCL 520b(b), and was acquitted of a second count of the same offense. He was sentenced to a prison term of 225 months to thirty-five years. Defendant appeals as of right. We affirm.

Defendant first argues he was denied a fair trial because evidence of prior bad acts was introduced in violation of the standard for introduction set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Specifically, he argues that although other prior bad acts evidence may have been properly admitted, evidence of his having digitally penetrated a five- or six-year-old relative years before was not sufficiently similar to the charged offenses of forced sexual intercourse with a teenaged relative to permit its admission.

We need not decide whether the prior bad acts evidence was improperly admitted because the error, if any, was clearly harmless. Our Supreme Court held in *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), that a criminal conviction can be reversed because of preserved nonconstitutional error only if "after an examination of the entire record it . . . affirmatively appear[s] that it is more probable than not that the error was outcome determinative." Even without the challenged evidence, the evidence of defendant's guilt (e.g., the detailed testimony of the victim, corroborating physical evidence, and evidence defendant concedes to be admissible involving three other similar prior bad acts) was so overwhelming that we cannot conclude that, had the challenged evidence been excluded, it is more probable than not that defendant would have been acquitted.

Defendant also seeks reversal on the ground of prosecutorial misconduct. We review allegations of prosecutorial misconduct de novo, examining challenged statements in context to

determine whether they deprived the defendant of a fair trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Our inquiry focuses on whether the challenged prosecutorial statements were innocuous, deliberate, intended to inflame the jury, or prejudicial to a defendant's right to a fair trial. Comments that are based on the evidence, are responsive to defense arguments, and do not appeal to the jury's fears or prejudices or sense of civic duty or invoke the prestige of the prosecutor's office generally do not constitute misconduct. *People v Bahoda*, 448 Mich 261, 263, 272; 531 NW2d 659 (1995).

Defendant details two statements made in rebuttal argument that he claims were improper. In the first, the prosecutor responded to the defense argument that the absence of rug burns on the victim's back when she claimed to have been raped on a carpet with her shirt pulled up weakened the credibility of her testimony. The prosecutor responded that the victim had testified her shirt was up only in the front, not in the back. Defendant promptly objected, claiming that this was not what the evidence showed. After a colloquy in which the prosecutor responded that this was her recollection of the evidence but that the jury could ultimately resolve the matter by reference to the transcript, the matter was ultimately resolved by allowing the jury, in the course of deliberations, to review the entire videotape of the victim's testimony.

Our review of the transcript indicates that, although the victim's testimony on this point is somewhat confusing and open to more than one interpretation, the prosecutor does indeed appear to have correctly stated what the victim said when she was given the opportunity to clarify her testimony.[1] And even if the prosecutor's interpretation was not correct, it certainly was an interpretation that the wording of the testimony would warrant. Being at least arguably correct, these comments, which were based on the evidence and responsive to defense arguments, were innocuous and were not deliberate misstatements. They did not constitute misconduct entitling defendant to a new trial. *Pfaffle, supra*; *Aldrich, supra*.

The second challenged statement was a statement by the prosecutor, in the course of asking a series of rhetorical questions during rebuttal concerning the credibility of a quasi-alibi defense supplied by defendant's wife, that she did not believe anything the defendant's wife said. Although the comment should not have been made, when reviewed in context, it was relatively innocuous, did not appeal to the jurors' sense of civic duty, and did not place the prestige of the prosecutor's office behind the statement. *Bahoda, supra.* Moreover, the judge immediately upheld a defense objection to the statement and admonished the prosecutor for making it. During the jury charge, the judge instructed the jurors that their verdict was to be based only on the evidence, and that attorneys' statements are not evidence. Any harm to defendant from the prosecutor's statement was remedied by this action of the trial judge. We therefore find no misconduct mandating reversal in this statement. *Pfaffle, supra*; *Aldrich, supra*.

[1] The relevant statement was, "Well, the shirt was up on the front, but it was still down in the back . . . . Yeah, it was like to like here, and then it was up. I don't know how to explain it." Earlier, the victim made other statements that were less clear.

Finally, defendant objects to the computation of the sentencing variables. Most of the objections relate to an oddity that occurred at the end of trial. The verdict form contained two counts of first-degree criminal sexual conduct, but the jury was never instructed as to which count related to which of the two courses of conduct charged. The jury convicted defendant on the second count, but reported that it was not able to reach a verdict on the first. After the jury was dismissed, it occurred to the judge and both counsel that they were not totally positive as to which count the defendant had been convicted of, although there seemed to be general agreement that defendant had been convicted for charged conduct on a Saturday morning but not for charged conduct the night before. The judge sentenced defendant on this basis but, over objection from defendant, found by a preponderance of the evidence that defendant had committed the acts charged on Friday as well as those charged on Saturday, and computed the sentencing variables accordingly. Defendant asserts that this was error, and specifically challenges the scoring of OV-7 at fifty points, for excessively brutal or terroristic conduct, and of OV-11 at fifteen points, for predatory conduct.

We find no error. Case law specifically permits a trial judge, in determining the applicable sentencing variables, to take into account alleged conduct for which the defendant was not convicted or even was acquitted, the rationale being that the fact that a person was not found beyond a reasonable doubt to have committed conduct does not mean that they cannot be found by a preponderance of the evidence standard applicable in sentencing determinations to have committed the same conduct. *People v Harris,* 190 Mich App 652, 663; 476 NW2d 767 (1991).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood